No. 96-1079 (2)

Supreme Court, U.S.
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In The

# Supreme Court of the United States

October Term, 1996

JOHANNA TREVINO, a minor,

*Petitioner,*

v.

DARYL GATES, TOM BRADLEY, HERBERT BOECKMANN, JERRY BROOKS, JOSEPH CALLIAN, MICHAEL SIRK, RICHARD SPELLMAN, GARY STRICKLAND, JAMES TIPPINGS, RICHARD ZIERENBERG, MANUEL AVILA, CHARLES BENNETT, BRIAN DAVIS, JOHN FRUGE, JOSEPH FREIA, EDWARD GUIZA, PETER SANCHEZ, REGINALD WEAVER, JAMES TOMA, C. S. WINSTON, PHILIP WIXON, GARY ZERBEY, JOEL WACHS, JOY PICUS, JOHN FERRARO, ZEV YAROSLAVSKY, RUTH GALANTER, ERNANI BERNARDI, NATE HOLDEN, MARVIN BRAUDE, HAL BERNSON, MICHAEL WOO, JOAN FLORES, ONE HUNDRED UNKNOWN NAMED EMPLOYEES OR OFFICIALS OF THE CITY OF LOS ANGELES, all in both their individual and official capacities; and CITY OF LOS ANGELES,

*Respondents.*

**On Petition For Writ Of Certiorari To The Court Of Appeals For The Ninth Circuit**

## BRIEF IN OPPOSITION

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## LIST OF INTERESTED PARTIES

In contravention of Rule 14.1(b) of this Court, Petitioner failed to provide a complete list of all parties to the proceeding in the United States Court of Appeals for the Ninth Circuit. Respondents hereby provide the required list of parties with an interest in the outcome of this litigation. There are no other parties or subsidiary companies which are required to be listed.

Petitioner herein and Plaintiff in the action below:

> Johanna Trevino, a minor, by and through her next friend, her grandmother, Filadelfia Cruz

Respondents herein and Defendants in the action below:

> Daryl Gates; Tom Bradley; Herbert Boeckmann; Jerry Brooks; Stephen Callian; Michael Sirk; Richard Spellman; Gary Strickland; James Tippings; Richard Zierenberg; Manuel Avila; Charles Bennett; Brian Davis; John Fruge; Joseph Freia; Edward Guiza; Peter Sanchez; Reginald Weaver; James Toma; C. S. Winston; Philip Wixon; Gary Zerbey; Joel Wachs; Joy Picus; John Ferraro; Zev Yaroslavsky; Ruth Galanter; Ernani Bernardi; Nate Holden; Marvin Braude; Hal Bernson; Michael Woo; Joan Flores; One Hundred Unknown Named Employees or Officials of the City of Los Angeles, all in both their individual and official capacities; and City of Los Angeles

**LIST OF INTERESTED PARTIES** – Continued

Other Defendants in the action below:

Tom Reddin; Roger Murdock; Ed Davis; James Fisk; Stephen Gavin; Maxwell Greenberg; Elbert Hudson; Marguerite Justice; Emmett McGaughey; Salvador Montenegro; Barbara Schlei; Robert Talcott; Reva Tooley; Robert Weil; Samuel Williams; Stephen Yslas; Warren Eggar; David Harrison; and John Helms

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## OPINIONS BELOW

Petitioner's statement of the opinions below omits citation to the orders of the United States District Court Central District of California granting defendant City of Los Angeles' Motion for Summary Judgment and defendant City Council Members' Motion for Summary Judgment which are unreported. *Trevino v. Gates, et al.*, Order Granting Defendant City Of Los Angeles' Motion For Summary Judgment (C.D. Cal. Feb. 3, 1995) and *Trevino v. Gates, et al.*, Order Granting Defendant City Council Members' Motion For Summary Judgment (C.D. Cal. Feb. 3, 1995).

## JURISDICTION

Respondents believe that this Court lacks subject matter jurisdiction under Article III to review and determine the issue presented, because resolution of those issues will not affect the substantive rights of the Petitioner. *See Allen v. Wright*, 468 U.S. 737, 757-58 (1984). The jurisdictional defects are more fully described in Section I of Reasons Why The Petition Should Be Denied, at pages 12 through 17 below.

The judgment of the United States Court of Appeals for the Ninth Circuit was entered on November 1, 1996, and the jurisdiction of this Court is petitioned pursuant to 28 U.S.C. § 1254(1).

## STATUTES INVOLVED

Because Petitioner omitted important portions of California Government Code § 825(b) from her Petition, and because Respondents believe that a more accurate view of the relationship between § 825 and 42 U.S.C. § 1983 is

obtained by reading the entire California statute, it is set forth verbatim here:

> (b) Notwithstanding subdivision (a) or any other provision of law, a public entity is authorized to pay that part of a judgment that is for punitive or exemplary damages if the governing body of that public entity, acting in its sole discretion except in cases involving an entity of the state government, finds all of the following:
>
> (1) The judgment is based on an act or omission of an employee or former employee acting within the course and scope of his or her employment as an employee of the public entity.
>
> (2) At the time of the act giving rise to the liability, the employee or former employee acted, or failed to act, in good faith, without actual malice and in the apparent best interests of the public entity.
>
> (3) Payment of the claim or judgment would be in the best interests of the public entity.
>
> As used in this subdivision with respect to an entity of state government, "a decision of the governing body" means the approval of the Legislature for payment of that part of a judgment that is for punitive damages or exemplary damages, upon recommendation of the appointing power of the employee or former employee, based upon the finding by the Legislature and the appointing authority of the existence of the three conditions for payment of a punitive or exemplary damages claim. The provisions of

> subdivision (a) of Section 965.6 shall apply to the payment of any claim pursuant to this subdivision.
>
> The discovery of the assets of a public entity and the introduction of evidence of the assets of a public entity shall not be permitted in an action in which it is alleged that a public employee is liable for punitive or exemplary damages.
>
> The possibility that a public entity may pay that part of a judgment that is for punitive damages shall not be disclosed in any trial in which it is alleged that a public employee is liable for punitive or exemplary damages, and that disclosure shall be grounds for a mistrial.

Cal. Gov't Code § 825(b).

Section 1 of the Ku Klux Klan Act of April 20, 1871, codified at 42 U.S.C. § 1983, provides:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

(West 1994).

## STATEMENT OF THE CASE

Petitioner's statement of the case represents only a partial recitation of the applicable facts and contains a variety of statements nowhere supported by the record. Respondents offer the following balanced distillation of the pertinent adjudicative and procedural facts which is drawn from the indisputable evidence presented to the courts below.

### I. BACKGROUND

This case arises from the robbery of a McDonald's restaurant in Sunland, California on February 12, 1990. The police officers who investigated and responded to the robbery were members of the Los Angeles Police Department ("LAPD") Special Investigation Service ("SIS"), a unit specializing in the apprehension of particularly dangerous criminals, such as the perpetrators of the McDonald's robbery who were suspected of committing armed robberies of several other McDonald's restaurants.

After robbing the restaurant, the perpetrators sought to escape in their car. As the LAPD officers approached the car, they saw guns pointed in their direction, whereupon they opened fire. Three of the four robbers were killed, and the fourth was wounded.

In a lawsuit entitled *Gomez v. Gates, et al.*, the surviving suspect and the heirs of the three dead robbers sued the officers, along with the then-Chief of Police Daryl Gates, various SIS officers and the City of Los Angeles, alleging violations of 42 U.S.C. § 1983 based on the use of excessive force. In February of 1992, the jury found Chief

Gates and the SIS officers liable and awarded nominal compensatory damages ($1) and a total of $44,000 in punitive damages in varying amounts against the LAPD officers. The jury returned its verdict in favor of the City. *See Gomez v. Gates*, 804 F. Supp. 69 (C.D. Cal. 1992).

Shortly thereafter, in April of 1992, Petitioner's counsel of record, then counsel for the *Gomez* plaintiffs, wrote a letter to the members of the Los Angeles City Council ("Councilmembers"), threatening to file suit against each of them personally if they exercised their authority under § 825(b) of the California Government Code to cause the City to pay the punitive damages awarded against the officers in *Gomez*. Section 825(b), set forth in full above, empowers a public entity, "acting in its sole discretion," to pay punitive damages awarded against a public employee if the entity's legislature expressly finds that: (i) the employee was acting within the course and scope of employment during the incident in question, (ii) the employee acted "in good faith, without actual malice and in the apparent best interests of the public entity," and, (iii) payment of the punitive damages "would be in the best interest of the public entity." Cal. Gov't Code § 825(b).

The City Council considered and debated whether to pay the punitive damages awarded in *Gomez*. In the face of Petitioner's counsel's threat to sue them personally, the Councilmembers determined, after two days of thoughtful deliberation (described at length in section II.C.3, below), that the facts of the McDonald's robbery satisfied the criteria of § 825(b), and they voted to have the City pay the punitive damages awarded in *Gomez*.

## II. PROCEEDINGS BELOW

### A. The Complaint

Petitioner's counsel then made good on his threat, filing this action on April 1, 1992 on behalf of Petitioner Trevino, the illegitimate daughter of one of the deceased robbers, who was born after the death of her father. In addition to the police officers who responded to the McDonald's robbery, the complaint in *Trevino* named the Councilmember Respondents as defendants, on the theory that their votes to pay punitive damages awarded against the police officers in *Gomez* and other cases somehow caused Petitioner's damages herein. Petitioner also alleged that these votes comprised an unconstitutional custom, policy or practice on the part of the City sufficient to give rise to municipal liability.

### B. The Councilmembers' Motion To Dismiss

Shortly after commencement of this action, the defendant Councilmembers brought a motion for dismissal on the ground of absolute legislative immunity, which the district court denied on or about August 7, 1992. *See Trevino v. Gates*, 798 F. Supp. 621 (C.D. Cal. 1992). The Councilmembers appealed to the Court of Appeals for the Ninth Circuit which affirmed the district court but expressly left open the issue of the Councilmembers' entitlement to summary judgment on grounds of *qualified immunity*. *Trevino v. Gates*, 23 F.3d 1480, 1483 n.3. (9th Cir. 1994). The Councilmembers then petitioned for certiorari to the Supreme Court on the issue of absolute immunity, and such petition was denied on October 11, 1994. *Wachs v. Trevino*, 115 S. Ct. 327 (1994) (mem.).

### C. The Councilmembers' And The City's Motions For Summary Judgment

Once the question of absolute immunity was settled, the Councilmembers filed a motion for summary judgment based on the application of qualified immunity under *Harlow v. Fitzgerald*, 457 U.S. 800 (1982). The City filed a companion motion based on the absence of evidence to show municipal liability under *Monell v. Department of Social Services*, 436 U.S. 658 (1978).

#### 1. The Record On Summary Judgment

##### a. The City's And Councilmembers' Efforts To Eradicate Excessive Force

The record before the district court was replete with evidence of the City's and Councilmembers' efforts to deter the use of excessive force by the LAPD. For example, in the early 1980's, the City Council conducted hearings into the LAPD's use of the bar-arm apprehension technique or "chokehold," and pressured the LAPD into discontinuing its use. In 1988, the Council initiated an investigation of the LAPD's drug raid policies and the underlying circumstances of the "39th and Dalton incident" to prevent a recurrence. In 1990, the Council supported the Mayor's investigation of the LAPD's actions taken during a janitors' strike, in an effort to hold the police accountable for the use of force.

The Council in 1988 looked into the operation of the SIS; the result was a revision and clarification of the unit's policies. In 1990, the Council's Budget and Finance Committee conducted an analysis of police-related litigation, not only to evaluate its financial impact on the City,

but also to distill and investigate any underlying trends in cases alleging police misconduct.

After the Rodney King incident, the Council addressed excessive force through its Special Ad Hoc Committee, first by proposing Proposition F, a City Charter amendment adopted by Los Angeles voters in 1992. Proposition F enhanced the accountability of the LAPD by empowering the Council to remove the Chief of Police, adding a civilian to the review board responsible for police discipline, extending the limitations period for commencing disciplinary action, and expanding the evidentiary standard and penalties available in disciplinary hearings. The Special Ad Hoc Committee recommended other measures which were implemented including: adoption of multi-lingual forms for police complaints; collection of these forms at locations other than police stations; and creation of a complaint hotline staffed by non-police personnel.

The Council's Budget and Finance Committee also took action. It directed the City's Chief Legislative Analyst to prepare detailed financial analysis of police litigation and had the LAPD submit a report regarding all litigation resulting in liability of $100,000 or more for the purpose of determining the discipline, if any, imposed on the police officers involved.

### 2. Deterrence Of Excessive Force Through Denial Of Legal Representation

Pursuant to City policy, only those police officers who are represented in litigation by the City Attorney may be eligible to have punitive damages awards paid by

the City. To be represented by the City Attorney, a defendant police officer files a request for representation that must be approved by both the Chief of Police and the City Attorney.

When it appears that a defendant officer has acted with malice or beyond the scope of police duties, the officer is denied representation. To date, LAPD officers have been denied representation in at least twenty lawsuits, eighteen of which occurred since 1989.[1] This is approximately twice the number of cases in which the City has paid punitive damages awarded against a police officer since 1985.

By denying legal representation, the City is sending a message that police officers should expect to be held personally accountable for the use of excessive force by having to pay their own legal fees as well as any punitive damages. Appellant's own expert witness on law enforcement procedures acknowledged that the fear of not being afforded legal representation is also a major deterrent to police misconduct.

### 3. Compliance With § 825(b)

Only a very small number of cases in which the City Attorney represents police officers result in verdicts which include punitive damages.[2] In each such case, the City follows a multi-step process.

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[1] These cases represent only a sampling. Because the City Attorney does not segregate these records, it is not possible to identify all such cases.

[2] Furthermore, the number of lawsuits filed against the LAPD represents a tiny fraction of the number of arrests made

Initially, the City Attorney provides the Council with a presentation of the underlying case, usually in writing and sometimes also verbally. The Council's Budget and Finance Committee then meets with representatives of the City Attorney's Office to evaluate the case and then reports to the full City Council. The Council in turn considers each case, usually with representatives of the City Attorney's Office present to answer questions. Sometimes, the Council discusses these cases in closed session.

As of the date on which the district court granted summary judgment, the City had paid punitive damages in just twelve cases, out of the more than 2,000 police-related lawsuits filed since 1985, when § 825(b) was enacted. The City did not pay punitive damages in *any* police case prior to February 12, 1990, when the McDonald's robbery occurred. In each of the twelve subsequent cases in which the City paid punitive damages on behalf of its police officers, the Councilmembers voted in favor of payment only after satisfying the criteria of § 825(b).

The Councilmembers' compliance with § 825(b) is summarized in the declarations submitted in support of the motion for summary judgment, and their deliberations and findings in each case are described in detail in their responses to Petitioner's extensive interrogatories. In fact, some of the cases in which the City paid punitive damages did not involve excessive force or bodily harm, arising instead from such circumstances as a luggage

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each year. For example, the LAPD made 146,046 arrests in 1993. There were a total of 246 lawsuits.

search, an arrest and strip search and the placement of a plaintiff's name in an "undesirable informant" file. The cases involving bodily injury, for the most part, took the form of abrasions or bruises from handcuffing, or abrasions suffered in altercations with arresting officers.

*Gomez* is the *only* case in which the City has paid punitive damages arising from a *shooting* or *death*. The Councilmembers devoted intense scrutiny to the facts and circumstances in *Gomez* in the course of making their determination under § 825(b). At the close of their first meeting, the Councilmembers deferred determination, requesting additional information and documents regarding the tactics used by the police, the basis of the jury's decision, the records of the police officers and the record of the SIS.

The Council continued its consideration of the *Gomez* case in a second day of deliberations. The Councilmembers were advised that, over its 27-year history, the SIS had conducted over 6,000 surveillances and made over 1,500 arrests of dangerous criminals, during which the unit was involved in 45 shooting incidents. Only two lawsuits prior to *Gomez* had arisen from SIS operations. The Council was further informed that the SIS used its "jamming" technique to trap criminals in their cars over one hundred times in the previous two years, resulting in only two shootings.

Having reviewed the historical context, the Councilmembers addressed the particular facts of the incident itself. The City Attorney and certain Councilmembers noted that the SIS officers involved were surprised by the robbers' departure from their usual tactics in previous

robberies and were faced with what appeared to be real firearms brandished by the perpetrators, in a chaotic situation under cover of darkness.

The Councilmembers also assessed the amount of punitive damages awarded by the *Gomez* jury and the post-trial comments of jurors. Certain Councilmembers noted that the relatively small sums appeared to reflect a compromise between jurors favoring and opposing an award of punitive damages. After considerable discussion, the Councilmembers voted to approve the payment of the punitive damages awarded in *Gomez*. They manifestly did not "rubber stamp" the actions of the LAPD; as the record before the lower courts demonstrated, the Councilmembers' adhered precisely to § 825(b).

### 4. The District Court's Ruling

On January 30, 1995, after Petitioner was allowed additional time for discovery, the Councilmembers and the City's motions for summary judgment came on for hearing. The district court granted both motions in their entirety on January 31, 1995, finding no genuine issue of material fact as to the liability of the City or the Councilmembers.

### 5. The Court Of Appeals' Ruling

Petitioner appealed to the United States Court of Appeals for the Ninth Circuit, which upheld summary judgment for the Councilmembers on the grounds of qualified immunity, finding that they had violated no

"clearly established law" by voting to indemnify the officers under § 825(b) of the California Government Code.

The court below also upheld summary judgment for the City on the grounds that no genuine issue of material fact existed as to establishing the prerequisites for § 1983 liability. After considering the voluminous record on appeal, the court found that: (1) Petitioner failed to adduce sufficient evidence to establish a formal governmental policy or longstanding practice or custom; (2) Petitioner failed to show that the SIS officers had "final policy-making authority;" and (3) Petitioner failed to adduce sufficient evidence to establish that the Councilmembers' vote to pay punitive damages constituted a decision to ratify the SIS officers' conduct.

### D. The Police Officers' Trial

Trial of Petitioner's claims against the police officer defendants commenced on February 6, 1995.[3] Because these defendants' liability arising from the McDonald's robbery had been determined in *Gomez v. Gates, et al.*, the trial court applied the doctrine of collateral estoppel to direct a finding of liability, and the trial was limited to the amount of compensatory damages recoverable by the Petitioner. The district court also applied the doctrine of collateral estoppel to preclude the issue of the amount of

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[3] The claims had earlier been mistried twice. The first mistrial resulted from improper closing argument by Petitioner's counsel, and the second mistrial resulted from Petitioner's counsel's failure to arrange for Petitioner's witnesses to be available to testify.

recoverable punitive damages at trial, holding that the punitive damages in *Trevino* could not exceed the sum awarded to any plaintiff in *Gomez*, based on Petitioner's unity of interest with her grandmother, Filadelfia Cruz, who was a plaintiff in *Gomez*.

On February 10, 1995, the jury returned its verdict, awarding Petitioner $1 in compensatory damages, just like the jury in *Gomez*. On March 14, the district court entered a separate judgment on punitive damages, awarding Petitioner a total of $9,109, the highest amount recovered by any plaintiff in the *Gomez* case. The defendant police officers did not appeal the district court judgment, and the City subsequently tendered payment of the award for compensatory damages to Petitioner.

Petitioner did appeal assigning error to the district court's application of collateral estoppel and to certain of its jury instructions and evidentiary rulings. The Ninth Circuit rejected these challenges to the judgment, and Petitioner has not challenged these rulings in the instant Petition.

## REASONS WHY THE PETITION SHOULD BE DENIED

The Petition should be denied for four fundamental reasons:

- *First*, there is no case or controversy within the meaning of Article III of the United States Constitution with respect to the issue on which review is sought.

- *Second*, the issue was neither raised in nor decided by any court below, and prudence dictates that this Court not consider it for the first time.

- *Third*, the issue was previously offered to the Court by Petitioner's counsel of record in a petition for writ of certiorari in another case, supported by a virtually identical brief, and that petition was denied, *see Cornwell v. Crawford*, 497 U.S. 1026 (1990) (mem.); if the Court determined that it would be imprudent to address the same issue presented in that case, then perforce it should deny the instant Petition, which is presented upon a murky procedural foundation and under circumstances in which subject matter jurisdiction is doubtful at best.

- *Fourth*, the Petition should be denied because the issue it presents borders on the frivolous: the rule which Petitioner offers would be both contrary to this Court's precedent and to wise policy.

## I. THERE IS NO CASE OR CONTROVERSY WITH RESPECT TO THE ISSUE PRESENTED BY THE PETITION

### A. Mootness And Standing

As this Court observed in *DeFunis v. Odegaard*, 416 U.S. 312, 316 (1974), it is "familiar proposition that 'federal courts are without power to decide questions that cannot affect the rights of litigants in the case before them.'" (quoting *North Carolina v. Rice*, 404 U.S. 244, 246 (1971)). This proposition derives from "the requirement of Article III of the Constitution under which the exercise of judicial power depends on the existence of a case or controversy." *Id.* (citations omitted). The "case or controversy" requirement of Article III implicates a variety of doctrines – standing, mootness, ripeness, political question, and the like – that place "fundamental limits on

judicial power in our system of government." *Allen v. Wright*, 468 U.S. 737, 750 (1984). Two of these doctrines – standing and mootness – counsel that consideration of the issue presented by the Petition would be offensive to Article III of the United States Constitution.

In order to have standing, a "plaintiff must allege personal injury fairly traceable to the Defendant's unlawful conduct *and likely to be redressed by the requested relief*." 468 U.S. at 751 (emphasis added) (citing *Valley Forge Christian College v. Americans United for Separation of Church and State, Inc.*, 454 U.S. 464, 472 (1982)). Unlike the "prudential" component of standing doctrine, this requirement of an "injury in fact" capable of being redressed by the requested relief is "derived directly from the Constitution." *Id.* at 751.

Mootness doctrine is also of constitutional dimension and requires that "the parties have a concrete interest in the outcome of the litigation." *Firefighters Local Union No. 1784 v. Stotts*, 467 U.S. 561, 571 (1984); *Securities and Exch. Comm'n v. Medical Com. For Human Rights*, 404 U.S. 403, 407 (1972) (federal judiciary's "lack of jurisdiction to review moot cases derives from the requirements of Article III of the Constitution").

These doctrines together apply to require denial of the Petition, because even assuming, *arguendo*, that this Court were to accept certiorari and resolve the issue presented in every respect as Petitioner's urge, the Court's ruling *would have absolutely no effect on the substantive rights of Petitioner as against any defendant*. Put another way, even if Petitioner were right about the issue she offers (which she is not), it would not add one cent to her

recovery and it would not result in any additional liability against any defendant. This is so for three independent reasons.

### B. The Councilmembers

First, as to the defendant Councilmembers, the lower courts concurred that, based on the then-current state of the law, the Councilmembers were entitled to qualified immunity. *Harlow v. Fitzgerald*, 457 U.S. 800. Under *Harlow* and its progeny, a public official sued for actions undertaken in his or her official capacity enjoys a qualified immunity from suit unless those actions violated clearly established law. 457 U.S. at 818-819; *Mitchell v. Forsyth*, 472 U.S. 511, 530 (1985).

The Councilmembers were sued simply for the act of voting to indemnify the *Gomez* officers, an act which was certainly legal under the law as it existed then; both the plain terms of § 825(b) of the California Government Code and the Ninth Circuit's decision in *Cornwell* gave every indication that such acts were legal. On this basis, the courts below concluded that qualified immunity applied to their conduct whether or not their acts were in fact constitutional. Under this Court's precedent, even *unconstitutional* acts do not give rise to official liability unless those acts were *clearly* unconstitutional at the time they were performed. *Id.* The Councilmembers, therefore, cannot have any liability to Petitioner by reason of their vote to pay punitive damages.

It ineluctably follows there is no "case or controversy" between the Petitioner and the Councilmembers, *even if* one were to assume that, as Petitioner urges, a

municipality would be prohibited from paying punitive damages. Quite simply, the Councilmembers were entitled to rely on the state of the law at the time they took their actions, and any change in the state of the law at this point could not affect the determinations below that these defendants were entitled to qualified immunity and dismissal on that basis.

### C. The Police Officers

Second, with respect to the remaining defendants other than the City of Los Angeles (i.e. the police officers), each has already been the subject of a final judgment for an award of compensatory *and* punitive damages, which was not appealed by them. No matter what decision this Court might render if it accepted certiorari on the issue offered by Petitioner, it would not and could not affect in any way the judgment entered against these defendants, thereby placing the Petition, insofar as it concerns these police officer defendants, well beyond the appropriate bounds of Article III.

### D. The City

Finally, the Petition is non-justiciable as to the remaining Respondent, the City of Los Angeles, because there simply is no theory of liability against the City pursuant to which Petitioner could collect any damages that she has not already collected. The provisions of California state law which prohibit a double recovery by tort plaintiffs would apply to prohibit any further action to recover for Plaintiff's harm, which harm has already been conclusively adjudicated as to amount and fully

redressed by tender of the award of judgment obtained by Petitioner.

It is indisputable that compensatory damages of $1 were awarded against the officers involved in the shooting, and it is equally indisputable that the officers have already tendered payment to Petitioner for her compensatory damages. Inasmuch as Petitioner has thus received full satisfaction of her injury, any judgment obtained against the City of Los Angeles for the same injury would constitute a double recovery – a notion offensive to principles of justice and to California common law.[4]

Consistent with the common law and common sense, California tort law adheres to the "single satisfaction" rule, which permits only one recovery for an injury:

> [T]here can be but one compensation for [a] joint wrong . . . the cause of action is satisfied once the injured party is paid for his injury by one of the joint tortfeasors, and [ ] the receipt by the injured party of any sum, if accepted as payment in satisfaction of the cause of action against one joint tortfeasor, is in law full satisfaction as to all joint tortfeasors.

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[4] The common law of California with regard to torts applies to the analysis by reason of 42 U.S.C. § 1988, which authorizes the assimilation of state law in the implementation of § 1983. *See* 42 U.S.C. § 1988 (West 1994); *Carey v. Piphus*, 435 U.S. 247, 258 n.13 (1978). Under California law, joint tortfeasors include those who "commit a tortious act, actively take part in it, or further it by cooperation or request, or encouragement to the wrongdoer, or *ratify and adopt his acts* for their benefit." *Sindell v. Abbott Labs.*, 607 P.2d 924, 932 (Cal. Sup. Ct. 1980) (quoting PROSSER, LAW OF TORTS § 46 (4th ed. 1971))

*Lamoreux v. San Diego and Ariz. E. Ry. Co.*, 311 P.2d 1, 5 (Cal. Sup. Ct. 1957); *Doherty v. California Kettlemen Oil Royalties, Inc.*, 88 P.2d 690, 693 (Cal. Sup. Ct. 1939); *see* RESTATEMENT (2ND) OF TORTS, § 885, cmt. e (1979).

*Even if* Petitioner were to prevail in this Court, and *even if* the City were deemed liable on all of the theories proffered by Petitioner, Petitioner *still* could not recover *any* compensatory damages against the City.[5]

Accordingly, resolution by this Court of the issue presented by the Petition *cannot* cause a single penny to be paid by the City, nor can it result in Petitioner's obtaining a single penny. It is difficult to imagine a case that falls more squarely within the constitutional principle that the court lacks jurisdiction unless the decision of the Court will somehow affect the rights of the parties as between each other.[6]

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[5] Of course, this Court's decision in *City of Newport v. Fact Concerts, Inc.*, 453 U.S. 247, 271 (1981), would prohibit Petitioner from obtaining any damages from the City other than compensatory damages.

[6] *See Simon v. Eastern Ky. Welfare Rights Org.*, 426 U.S. 26, 45-46 (1976) (ordering dismissal for lack of subject matter jurisdiction where there was "no substantial likelihood that victory in [that] suit would result in [plaintiff's] receiving the hospital treatment they desire[d]"); *Lake Coal Co., Inc. v. Roberts & Schaeffer Co.*, 474 U.S. 120 (1985) (per curiam) (satisfaction of claim by settlement required dismissal of writ of certiorari as moot, despite the parties' express desire and strong interest in having case heard); *Securities and Exh. Comm'n*, 404 U.S. at 405-6 (suit over proper contents of corporate proxy statement dismissed as moot where, after initiation of suit, shareholders voted down the proposal in the proxy statement).

## II. THE ISSUE PRESENTED BY THE PETITION WAS NEITHER RAISED NOR DETERMINED BELOW

A perusal of the opinion of the Court of Appeals below and of the briefs presented to the Court of Appeal demonstrates that at no point did Petitioner attempt to challenge, as she does by this Petition, the Ninth Circuit's pronouncement in *Cornwell v. Crawford*, 497 U.S. 1026 (1990) (mem.). Having failed to contend below that § 825(b) of the California Government Code is repugnant to § 1983, Petitioner must be precluded from raising the issue before this Court. *See Equal Employment Opportunity Comm'n v. Federal Labor Relations Auth.*, 476 U.S. 19, 24 (1986) ("our normal practice, from which we see no reason to depart on this occasion, was to refrain from adjudicating issues not raised in the Court of Appeals.") (dismissing writ of certiorari as improvidently granted); *Price Waterhouse v. Hopkins*, 490 U.S. 228, 240 n.5 (1989) (refusing to address argument not raised below) (modified in part on other grounds by 1991 Civil Rights Act § 107); *City of Springfield, Mass. v. Kibbe*, 480 U.S. 257, 259 (1987) (Supreme Court "ordinarily will not decide questions not raised or litigated in the lower courts."); *Browning-Ferris Indus. v. Kelco Disposal, Inc.*, 492 U.S. 257, 277 (1989) (refusing to consider whether award of punitive damages violated due process where issue not raised before district court or court of appeals.).

## III. THE ISSUE PRESENTED BY THE PETITION WAS PREVIOUSLY REJECTED BY THIS COURT

Remarkably, Petitioner fails to point out to the Court that the precise issue raised by this Petition was

previously the subject of at least one other petition for certiorari, which was denied by this Court several years ago. *Cornwell v. Crawford*, 497 U.S. 1026 (1990) (mem.). This failure is all the more remarkable because Petitioner's counsel of record also represented petitioner in *Cornwell*, and the bulk of the Petition he presents today (other than the statement of the case) is lifted *verbatim* – word for word, sentence for sentence – from the earlier petition denied by the Court. It is difficult to perceive any reason why this Court should grant this Petition when it previously denied a petition raising the same issue, based upon the identical argument. The instant Petition is, in effect, Plaintiff's counsel's request for reconsideration of this Court's earlier denial of the petition he prepared in *Cornwell*.

## IV. THE PETITION PRESENTS AN ISSUE WITHOUT SUBSTANTIVE MERIT

The basic premise of Petitioner's argument is that this Court somehow concluded in *Fact Concerts*, 453 U.S. 247, that an individual against whom a punitive damages award has been assessed under 42 U.S.C. § 1983 cannot have that award paid for him or her by the municipality which employs him *even if* the municipality, through its highest elected governing body, voluntarily chooses to do so. Petitioner's argument is entirely without foundation in reason. The decisions of the Ninth Circuit and the trial court below in this case are correct and do not "pervert" federal law, as Petitioner claims. They are, in fact, entirely consistent with both federal law and common sense.

First, the legal arguments contained in the Petition are based almost exclusively on language drawn out of context from the Court's decision in *City of Newport v. Fact Concerts, Inc.*, which simply held that:

> Because absolute immunity from such damages obtained at common law and was undisturbed by the 42d Congress, and because that immunity is compatible with both the purposes of § 1983 and general principles of public policy . . . a municipality is immune from punitive damages under 42 U.S.C. § 1983.

453 U.S. at 271. As discussed below, it is impossible to deduce from this holding the principle that a municipality is constitutionally prohibited from voluntarily deciding to pay punitive damages. All that decision stands for is the obvious proposition that § 1983 does not *create* a right to punitive damages against a municipality, where there was none at common law.

Second, Petitioner's "policy" arguments are also without merit. Common sense dictates that punitive damage awards do not necessarily lose their effectiveness if an individual reaches some arrangement to have the award paid on his behalf. More importantly, the rule which Petitioner urges would violate the most basic principle of democratic government – that the people, through their duly elected representatives, have the right to govern themselves, which includes the right to make decisions about how, when and under what conditions voluntarily to spend their tax dollars. In effect, Petitioner would have this Court overrule the decisions of *two* popularly elected legislative bodies – the California legislature that enacted § 825(b) and the Los Angeles City

Council – not because those decisions have harmed her, but because her counsel personally objects to their legislative actions and has chosen to press that objection in this Court rather than through the political process.

### A. *Fact Concerts* Does Not Directly Or By Implication Prohibit A Municipality From Voluntarily Choosing To Satisfy A Punitive Damage Award Against A Municipal Employee

Respondents respectfully submit that the main argument in the Petition consists of a "house of cards." Petitioner's assertion that she is legally entitled to prevent a public agency from paying a punitive damages award on an individual's behalf is based upon the assumption that there is some body of law, known as the "federal common law of punitive damages," which requires that one who has a punitive damages award assessed against him must pay that award out of his own pocket. This "federal common law of punitive damages", as Petitioner calls it, purportedly derives from certain statements made by this Court in the *Fact Concerts* case, together with what Petitioner calls "principles of retribution." Based on this faulty chain of reasoning, Petitioner leaps to the conclusion that a conflict exists between federal law and § 825(b)'s authorization of voluntary indemnification by municipalities.

First, it is important to observe that the Court's decision in *Fact Concerts* was rendered in a context significantly different from this case. In *Fact Concerts*, this Court simply ruled that the common law immunity of municipalities from punitive damages was properly assimilated

in a § 1983 action, and thus it was error for the district court to instruct the jury to award punitive damages against the City of Newport. 453 U.S. at 259-60.

In reaching that conclusion, the Court canvassed the state of the law of immunity as it existed in 1871, when the 42d Congress enacted § 1983, finding that Congress did not intend to abrogate the pre-existing common law principle that a municipality is immune from exemplary damages. 453 U.S. at 258-66. In support of its analysis, the Court also considered whether public policy dictates that § 1983 should be construed differently than these common law principles of immunity, 453 U.S. at 266-71, and concluded that the common law immunity afforded to municipalities should remain in force, 453 U.S. at 271.

Significantly, in footnote 30 of its opinion, the Court recognized that several state statutes relating to indemnity of municipal employees "specifically exclude indemnification for malicious or willful misconduct." 453 U.S. at 296 n.30. The Court cited rules from five states, including § 825 of the California Government Code (prior to its amendment in 1985 which added subsection (b) concerning punitive damages). *Id.* Indeed, footnote 30 acknowledged the existence of statutes in other states which *require* such indemnification and did not even hint that the constitutionality of those states was in question – as it surely would have if the opinion in fact stood for the proposition that a city may never pay punitive damages under any circumstances, as Petitioner urges here.

Petitioner and her counsel have attempted to stretch the application of the *Fact Concerts* decision from one where a municipality is rendered *immune from involuntary*

*coercive assessments* of exemplary damages to a ruling that a municipality is *prevented from voluntarily choosing to indemnify* certain officers or employees pursuant to state statute. However, this Court only ruled in *Fact Concerts* that § 1983 cannot *involuntarily* expose municipalities to liability for exemplary damages in contravention of the common law rule. The question of *voluntary* indemnification of an individual employee by a municipality was clearly not before the Court, and no tortured reading of the decision by Petitioner and her counsel can make it so. The fact that the Court reaffirmed municipal *immunity* from exemplary damages clearly does not mean that state statutes relating to *indemnity* are prohibited by, or conflict with, the *Fact Concerts* decision or any purported "federal law of punitive damages" stated therein.[7]

Petitioner's confusion as to the *voluntary nature* of indemnification carries through to her faulty analysis of this Court's decision in *Pavelic & LeFlore v. Marvel Entertainment Group*, 493 U.S. 120 (1989), which Petitioner quotes liberally in support of her argument that there exists a federal common law of punitive damages which prohibits indemnification of such awards. *Pavelic*, however, simply stands for the proposition that, *in the first instance*, sanctions under Rule 11 of the Federal Rules of Civil Procedure must be imposed upon the individual signing the sanctionable paper and not against his or her law firm. 493 U.S. at 127. Petitioner's misreliance on this

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[7] In this regard, Petitioner's citation to *Guillory v. County of Orange*, 731 F.2d 1379 (9th Cir. 1984) and *Martinez v. California*, 444 U.S. 277 (1980), are misplaced. Those cases dealt with actual immunity from liability, not with indemnity.

precedent is most vividly demonstrated by her deliberate failure to mention that the *Pavelic* opinion *expressly* acknowledged that the sanctioned attorney's law firm "may not *choose* to seek recompense from him." *Id.* (emphasis added). In short, it is impossible to read *Fact Concerts, Pavelic* or *any* of the decisions of this Court cited by Petitioner in the way Petitioner urges.

Two other federal courts have rendered decisions which are consistent with Respondents' reading of the scope of the *Fact Concerts* opinion. In *Bell v. City of Milwaukee*, 746 F.2d 1205 (7th Cir. 1984), the Seventh Circuit considered, *inter alia*, the relationship between a Wisconsin law which required indemnification of public officials and § 1983. The City of Milwaukee argued there, as Petitioner argues here, that the Court's decision in *Fact Concerts* overrode the state statute. 746 F.2d at 1271. Thus, the City asserted, it was not required to pay the judgments assessed against the individual defendants. *Id.* The Seventh Circuit rejected Milwaukee's argument, noting that the *Fact Concerts* opinion explicitly recognized the existence of state law indemnity for punitive damages liability and further impliedly recognized that a public agency may, because of the effect of state law, ultimately indemnify a punitive damage award assessed against its employees. *Id.*

In *Haile v. Village of Sag Harbor*, 639 F. Supp. 718 (E.D.N.Y. 1986), the plaintiff brought, *inter alia*, § 1983 claims against the Village of Sag Harbor, the Town of Southampton, and several of its police officers for excessive force. The plaintiff sought punitive damages from the police officers. Relying on *Fact Concerts*, Southampton argued that the claims for punitive damages should be

dismissed because New York law required an agency to indemnify its officers, and Southampton was thus, in effect, the real party in interest. 639 F. Supp. at 723. The *Haile* court rejected this argument in no uncertain terms:

> This result is wholly unjustified. The Supreme Court in [*Fact Concerts*] held simply as a matter of statutory construction that the Congress which enacted the original civil rights statute did not intend to create a punitive damages remedy against municipalities . . . To accept defendants' argument would require the Court to misread [*Fact Concerts*], *which expressed no view on the allocation of liability under state law*. . . .

639 F. Supp. at 723-24 (emphasis added).

Further, the Ninth Circuit Court of Appeals and the California Supreme Court have each considered the general relationship between California Government Code § 825 and federal law and have refused to find preemption. In *Demery v. Kupperman*, 735 F.2d 1139, 1147 (9th Cir. 1984), *cert. denied sub nom., Rowland v. Demery*, 469 U.S. 1127 (1985), the Ninth Circuit ruled that the general indemnity principles of § 825 do not mean that a judgment against a state employee violates Eleventh Amendment principles of sovereign immunity. The court stated that "California's obligation [under the then-existing version of § 825] to pay the damages awarded against its employees derives from an *entirely collateral and voluntary undertaking* on the part of the state." 735 F.2d at 1148-49 (emphasis added).

In *Williams v. Horvath*, 548 P.2d 1125, 1131 (Cal. Sup. Ct. 1976), the California Supreme Court ruled that the

indemnification provisions of the California Government Code (contained in a predecessor statute) apply to actions brought under the Civil Rights Act of 1871. In reading this result, the California Supreme Court determined, *inter alia*, that nothing in the federal authorities indicates that local agencies are *precluded* from providing indemnity to its employees in a § 1983 action. 548 P.2d at 1131-32. Although the *Williams* decision was rendered before the 1985 amendment to § 825 which added subsection (b) relating to punitive damages, the California Supreme Court implicitly noted in *Williams* that, upon proper statutory authorization, a local agency could indemnify an officer for punitive damages:

> [I]t is suggested that police officers, like other officials, at times may abuse their authority, and the law demands they be held to answer for any wrong so committed. Thus it may be argued that to permit indemnification would remove an effective deterrent to illegal police conduct – the potential for personal liability. But in truly egregious cases the indemnification statutes expressly forbid reimbursement by the entity, and indemnification without authorization would be open to a charge of unlawful gift of public funds. Secondly, the indemnification provisions in effect facilitate the bringing of actions against erring public servants, because the plaintiff is assured that the financial resources of the entity will stand behind the judgment. Thirdly, we might also reasonably surmise that indirect entity liability through indemnification will cause the entity to exercise an additional degree of caution in the hiring and supervision of employees whose functions carry a greater risk of potential liability.

> Accordingly, we conclude that the indemnification provisions remain applicable whether the action is grounded on the Tort Claims Act or on Section 1983.

548 P.2d at 1134 (footnote omitted).

Finally, because there is no real federal pronouncement, as Petitioner advocates, which preempts a state's right to enact indemnification legislation, Petitioner's discussion of the preclusive effect of 42 U.S.C. § 1988 is meaningless. Section 1988 only operates to nullify state law if there is some actual conflict or inconsistency between state and federal law. *See Board of Regents v. Tomanio*, 446 U.S. 478, 485 (1980). And Petitioner's discussion of the application of § 1988 presumes, without any legal support, that state principles of indemnity are to be equated with substantive rules affecting the availability of remedies. The availability of governmental indemnification of officials under state law does not affect or in any way impair any judgment or any remedy under § 1983, nor does it affect or impair a plaintiff's substantive rights under § 1983.

Petitioner has tried to characterize this case as involving a direct conflict between state indemnity statutes and § 1983 such that preemption principles and the preclusive terms of § 1988 apply. As the foregoing discussion points out, however, a public agency's decision to invoke the indemnity provisions of California Government Code § 825(b) is a matter which is entirely separate and distinct from the fact of the punitive damages judgment itself. Under such circumstances, principles of comity and federalism dictate that the federal courts should not needlessly encroach upon the authority of the statutes

to authorize such "collateral and voluntary" action. *See Demery*, 735 F.2d at 1149; *see also Molina v. Richardson*, 578 F.2d 846, 852 (9th Cir. 1978), *cert. denied*, 439 U.S. 1048 (1978) (California indemnity statutes, when applied to § 1983 claims in federal courts, "at once serve the interests of federalism and general constitutional values").

### B. Preemption Of California Government Code § 825(b) Is Precluded By Policy Considerations

Petitioner also asserts that § 825(b) should be preempted because "the purposes of assessment of punitive damages in civil rights actions do not permit such burden-shifting" and because "traditional notions of punishment and responsibility do not permit" it. These policy arguments do not add anything to the Petition.

Petitioner blithely ignores the fact that an award of punitive damages against an agency's employee does not lose its impact on that employee even if he does not pay it. The mere fact that such a judgment is *entered* may be punishment enough, for the associated stigma will remain with the officer forever, and would present a considerable impediment to promotion, salary increases and job mobility. Beyond the consequences to the individual against whom the damages are awarded, the judgment would not lose its effectiveness as a "standing warning" to others, thereby serving the purposes of general deterrence.

Most importantly, § 825(b) does *not* give the officer an unqualified right to have the judgment paid for him. The agency must *voluntarily* decide to authorize the payment, which it may not always decide to do for various

reasons. *See Williams v. Horvath*, 548 P.2d at 1134. There is always a risk that the officer must bear his or her own punitive damages, and § 825(b) gives the officer no right to complain about an adverse legislative determination on indemnity.[8]

Finally, Petitioner's policy argument that a punitive damage award must be paid by the individual defendant would also require the Court to rule that payment could not come from any other sources, such as a private foundation, an employees' association, or even a friend or relative. Taken to its logical extreme, Petitioner's theory would also require that municipalities be prohibited from even settling such claims. These absurd and unnecessary results further expose the untenable nature of Petitioner's argument.

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[8] It is this aspect of *voluntariness* of the indemnification authorized by § 825(b) that distinguishes the common rule that an insurer may not indemnify for punitive damages. Such a contract for insurance would *require* such indemnification, thereby giving license to insureds to act wrongfully with impunity. No such license is provided by § 825(b), which contains a variety of preconditions to any indemnification, and makes such indemnification an entirely discretionary decision of the governing body of the public entity.

## CONCLUSION

For the foregoing reasons, Respondents respectfully submit that the Petition should be denied.

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Respectfully submitted,

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